LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
APR 14 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

70-49

No. ~~1060~~

STATE OF HAWAII, *Petitioner*,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, UNION OIL COMPANY OF CALIFORNIA, SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

BERTRAM KANBARA,
Attorney General, State of Hawaii,
GEORGE PAI,
Deputy Attorney General,
State Building,
Honolulu, Hawaii 96813,
JOSEPH L. ALIOTO,
PETER J. DONNICI,
111 Sutter Street, Suite 1421,
San Francisco, California 94104,
Counsel for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Opinions of the courts below	1
Jurisdiction	2
Questions presented	3
Statutes involved	5
Statement	7
Summary of argument	13
Argument	18
I. The decision of the Court of Appeals below erroneously emasculates the effectiveness of the civil action pursuant to Section 4 of the Clayton Act as a vital means for enforcing the antitrust policy of the United States	18
II. The State of Hawaii should be permitted to maintain this civil antitrust action for damages and injunctive relief in its capacity as parens patriae	22
A. The parens patriae remedy is necessary in the present case	22
B. Georgia v. Pennsylvania R. Co. established the right of the State of Hawaii, as parens patriae, to maintain an antitrust action as alleged in count two of the amended complaint	27
III. Petitioner State of Hawaii, as parens patriae, may recover damages under Section 4 of the Clayton Act	35
A. Georgia v. Pennsylvania R. Co. recognizes that all of the civil remedies and sanctions of the antitrust laws are available to the state in an action as parens patriae	36
B. The State of Hawaii has standing under Section 4 of the Clayton Act to maintain this action for damages, as parens patriae	45
C. The Court of Appeals erred in ruling as a matter of law that the economy of the State of Hawaii could not be injured by the pervasive conspiracy here alleged or that any such injury could not be reasonably measured in damages	49

Page

D. The Court of Appeals erroneously ruled that the injury to the State of Hawaii was so incidental, remote and indirect as to be outside the "target area" of respondents' antitrust violation 56

IV. The State of Hawaii, in its capacity as parens patriae, should be permitted to maintain this action under Section 4 of the Clayton Act as the representative of its citizens 62

Conclusion 67

Table of Authorities Cited

Cases	Pages
Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970)	48, 60
Barlow v. Collins, 397 U.S. 159 (1970)	60
Bigelow v. R.K.O. Radio Pictures, Inc., 327 U.S. 251 (1946)	4, 16, 20, 53, 54
Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292 (2nd Cir. 1958)	56
Bruce's Juices v. American Can Co., 330 U.S. 743 (1947)	19
California v. F.P.C., 296 F.2d 348 (D.C. Cir. 1961)	65
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)	48, 49, 53, 56
Eastman Kodak Co. v. Southern Photo Materials, 273 U.S. 359 (1927)	53
Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945)	passim
Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907)	28, 32, 35, 37, 63, 64
Guam v. Fed'l Maritime Comm., 329 F.2d 251 (D.C. Cir. 1964)	65
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968)	13, 14, 24, 25, 30, 66
Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967)	18, 59
In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	65
Kansas v. Colorado, 185 U.S. 125 (1901)	63
Kansas v. Colorado, 206 U.S. 46 (1906)	32, 37
Keogh v. Chicago & N.W. R. Co., 260 U.S. 156 (324 U.S. at 453)	14, 42
Land O'Lakes Creameries v. Louisiana, 160 F.Supp. 387 (E.D. La. 1958)	22, 27, 63, 64
Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955)	19, 57
Loeb v. Eastman Kodak Co., 183 Fed. 704 (3rd Cir. 1910)	56
Louisiana v. Texas, 176 U.S. 1 (1900)	22

Pages

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) 17, 20, 57
Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3rd Cir. 1956), cert. denied, 352 U.S. 890 (1956) 56
Missouri v. Illinois, 180 U.S. 208 (1901) 32, 63
Mormon Church v. United States, 136 U.S. 1 (1890) 30
Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970) 18, 47, 58, 59

New Hampshire v. Louisiana; New York v. Louisiana, 108 U.S. 76 (1883) 22, 27
New York v. New Jersey, 256 U.S. 298 (1921) 63
North Dakota v. Minnesota, 263 U.S. 365 (1923) 22, 27

Oklahoma v. A.T.&S.F. Ry., 220 U.S. 277 (1944) 28, 29, 41
Oklahoma v. Cook, 304 U.S. 387 (1937) 22, 27

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 31, 32, 35, 37, 43
Perkins v. Standard Oil of California, 395 U.S. 642 (1969) 48, 49
Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 14, 19, 48, 57
Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2nd Cir. 1955) 56

Radiant Burners v. People's Gas & Light Co., 364 U.S. 656 (1961) 21, 48
Radovich v. National Football League, 352 U.S. 445 (1957) 17, 21, 48, 49, 57, 58

Snow Crest Beverages v. Recipe Foods, 147 F.Supp. 907 (D. Mass. 1956) 57
South Carolina Council of Milk Producers v. Newton, 360 F.2d 414 (4th Cir. 1966) 18, 46, 48, 58
South Dakota v. North Carolina, 192 U.S. 286 (1904) 28, 32
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 46, 53, 54

Twentieth Century-Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir. 1964) 58, 59

Pages

United States v. Borden Co., 347 U.S. 514 (1954) 38, 39
United States v. South-Eastern Underwriters Ass'n, 332 U.S. 533 (1948) 21

Waldron v. British Petroleum Co., 231 F.Supp. 72 (S.D. N.Y. 1964) 15, 47
Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966) 54, 55
Wisconsin v. F.P.C., 373 U.S. 294 (1963) 65

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 38, 39, 54

Rules

Federal Rules of Civil Procedure, Rule 23 10

Statutes

Sherman Act:
Section 1 (15 U.S.C. §1) 6, 7, 49
Section 2 (15 U.S.C. §2) 6, 7

Clayton Act:
Section 4 (15 U.S.C. §15) ..... passim
Section 16 (15 U.S.C. §26) 2, 6, 7, 37, 38, 39

28 U.S.C.:
Section 1254(1) 3
Section 1292(b) 3
Section 1337 2

Texts

C. L. Allen, The Framework of Price Theory, p. 212 (1967) 51

Antitrust Remedies, 23 Vanderbilt L. Rev. 405, 409-411 (1970) 31, 51

Joe S. Bain: Barriers to New Competition (1956) 50
Industrial Organization (1968) 50

Pages

Price Theory (1966) 50

The Economics of the Pacific Coast Petroleum Industry, (1944-1947), v. I-III 50

Comparative Living Costs Table, U.S. Dept. of Labor Bulletin No. 1570-1, p. 12, Autumn 1966 52

Demetz, Toward a Theory of Property Rights, 57 American Econ. Review (1967) 51

Isard, et al., On the Linkage of Socio-Economic and Ecological Systems, 21 Papers of the Regional Science Ass'n, p. 79 (1968) 50

Malina and Blechman, Parens Patriae Suits for Treble Damages Under the Antitrust Laws, 65 N.W. L. Rev. 193 (1970) 30

Neal, et al., Report of the White House Task Force on Antitrust Policy, Antitrust Law and Economics Review, Vol. 2, No. 2, Winter 1968-69, p. 11 ..... 51, 52

Report of the Task Force on Productivity and Competition, George J. Stigler, et al., Antitrust Law and Economics Review, Vol. 2, No. 3, Spring 1969 62

Samuelson, Economics, An Introductory Analysis, 265-267 (1951) 51

Standing to Sue for Treble Damages Under Section 4 of the Clayton Act, 64 Colum. L. Rev. 570 (1964) 20, 48, 57

State Protection of Its Economy and Environment: Parens Patriae Suits for Damages, 6 Colum. Journal of Law and Social Problems, 411, 419-420 (1970) 50, 51, 55

Wade and Kamenshine, Restitution for Defrauded Consumers, 37 Geo. Wash. L. Rev. 1031, 1048 (1969) 30, 31, 51, 66

Wrongs Without Remedy, 43 So. Cal. L. Rev. 570, 594-595 (1970) 67

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1060

STATE OF HAWAII,
Petitioner,
vs.
STANDARD OIL COMPANY OF CALIFORNIA, UNION OIL COMPANY OF CALIFORNIA, SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

OPINIONS OF THE COURTS BELOW

The opinion of the District Court for the District of Hawaii is reported at 301 F. Supp. 982 (D. Haw. 1969). That decision is set forth as Appendix I to the Petition for Writ of Certiorari filed previously herein, and at page 82, *et seq.* of the single Appendix (hereinafter "App., p. ....").

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 431 F.2d 1282 (9th Cir. 1970). That decision is set forth as Appendix II to the Petition for Writ of Certiorari and at p. 100, *et seq.* of the single Appendix filed herein.

JURISDICTION

This is a civil action for injunctive relief and damages initiated by petitioner, the State of Hawaii against respondents Standard Oil Company of California, Union Oil Company of California, Shell Oil Company and Chevron Asphalt Company. The action was filed in the United States District Court for the District of Hawaii which possessed jurisdiction under 28 U.S.C. §1337 and 15 U.S.C. §§ 15, 26. In the District Court, plaintiff-petitioner sought injunctive relief and damages from respondents who were alleged to have combined and conspired to fix the prices of motor gasoline, other refined petroleum products and asphalt. The State of Hawaii sought relief for injuries it suffered in its proprietary capacity (Count One), and as *parens patriae* for injuries to the State and its economy as well as guardian, trustee, and protector of its citizens (Count Two), and also through a class action on behalf of all consumers in the State who suffered individual injury (Count Three).

Upon respondents' motion to dismiss Counts Two and Three of the complaint, the District Court sustained the right of the State to maintain its action for damages and injunctive relief as *parens patriae*, but dismissed Count Three, the class action. *State of Hawaii v. Standard Oil*

Company of California, et al., 301 F.Supp. 982 (D. Hawaii 1969) (App., p. 80).

Respondents, pursuant to 28 U.S.C. §1292(b) appealed from the order denying their motion to dismiss Count Two. On September 25, 1970, the United States Court of Appeals for the Ninth Circuit reversed the ruling of the District Court and remanded the case ". . . with instructions that Count Two of Hawaii's amended complaint be dismissed." *State of Hawaii v. Standard Oil of California, et al.*, 431 F.2d 1282 (9th Cir. 1970). (App., p. 106).

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 25, 1970 (App., p. 107). No rehearing or extension of time was either sought or granted. The petition for a Writ of Certiorari was filed on December 5, 1970, and was granted on March 1, 1971 (App., p. 108).

The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The overriding issue here involved relates to the right of the State of Hawaii to utilize the remedies provided by the federal antitrust laws in maintaining an action as *parens patriae* for injuries to the State as a result of a widespread, pervasive price-fixing conspiracy perpetrated by various major oil companies and directed against the captive market of the State of Hawaii, its economy and its consumer citizens in general. At stake is the continuing vitality of this Court's decision in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), as a

basis for the effective enforcement of the antitrust policy of the United States through civil actions initiated by the states under circumstances in which actions by private consumers are not realistically feasible or practical.

Specifically, the questions presented for review by this Court are:

I. Whether a state, as *parens patriae,* may enforce the civil sanctions of the antitrust laws and maintain an action for damages and injunctive relief against major oil companies which have combined and conspired to fix inflated prices *in that state* injuring the economy and general welfare of the state and adversely affecting a substantial portion of the citizenry who are without an otherwise effective remedy?

II. Whether the Court of Appeals erred in ruling that the State of Hawaii, as *parens patriae,* does not have standing to maintain an action under Section 4 of the Clayton Act (15 U.S.C. §15)?

III. Whether the Court of Appeals erred in its failure to recognize that, under *Georgia v. Pennsylvania Railroad Co., supra,* a comprehensive and pervasive price-fixing conspiracy, such as alleged herein, directed against the markets and consumers within the State of Hawaii could cause substantial injury to the economy and well-being of the State itself and its citizenry as a whole, and that such injuries are not so indirect as to preclude petitioner's standing to maintain the present action?

IV. Whether, in light of numerous cases such as *Bigelow v. R.K.O. Radio Pictures, Inc.,* 327 U.S. 251 (1946), the Court of Appeals erred in its remand for summary

dismissal of the *parens patriae* claim which thereby precluded plaintiff from presenting relevant economic data from which the jury could have reasonably estimated the extent of the economic injury and damages suffered as a result of the respondents' illegal and profitable price-fixing scheme?

V. Whether in its remand of the cause for summary dismissal, the Court of Appeals erred in failing to permit petitioner, in its effort to enforce the policies of the antitrust laws and prevent the unjust enrichment by the respondent-wrongdoers, to maintain the present action as *parens patriae,* trustee, guardian and protector of the citizen-consumers and recover the damages suffered by such citizens and residents of the State who are otherwise unable to seek recovery for themselves, especially in a case such as this one where the alleged wrong has also injured the economy and well-being of the State?

STATUTES INVOLVED

1. The Clayton Act, Section 4 (15 U.S.C. §15) provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. The Clayton Act, Section 16 (15 U.S.C. §26) provides:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323 §16, 38 Stat. 737."

3. The Sherman Act, Section 1 (15 U.S.C. §1) provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

4. The Sherman Act, Section 2 (15 U.S.C. §2) provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT

This is a civil antitrust action for treble damages and injunctive relief initiated by the petitioner, State of Hawaii against the respondents, Standard Oil Company of California (hereinafter "Standard"), Union Oil Company of California (hereinafter "Union"), Shell Oil Company (hereinafter "Shell") and Chevron Asphalt Company (hereinafter "Chevron"), pursuant to sections 4 and 16 of the Clayton Act (15 U.S.C. §§15, 26). Count One of the fourth amended complaint, alleges that the respondents combined and conspired to fix and maintain unreasonably high prices for motor gasoline, asphalt and other refined petroleum products and, further, that they monopolized trade and commerce in such products in violation of Sections 1 and 2 of the Sherman Act, (15 U.S.C. §§1, 2) (R. 46-50). (App., pp. 62-63). In this respect, the State alleges that—as a purchaser of gasoline, asphalt and such other products through its departments, institutions and agencies—it was compelled to pay higher prices for these products than it would have paid in a free and competitive market. (R. 50) (App., p. 64).

Count Two of the amended complaint re-alleges the conspiracy by and between Standard, Union, Shell and Chevron and additionally alleges (R. 50-51) (App. p. 64):

"19. The State of Hawaii, acting through its Attorney General, brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae,* trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws, hereinbefore alleged. 20. The unlawful contracts, combination and conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize and monopolization, hereinbefore alleged, have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:

(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;[1]

(b) taxes affecting the citizens and commercial entities have been increased to affect[2] such losses of revenues and income;

(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;

(d) the full and complete utilization of the natural wealth of the State has been prevented;

(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

---

[1]This should read as follows: "revenues of its citizens have been wrongfully extracted from the *economy and citizens* of the State of Hawaii."

[2]This is a typographical error. The word "affect" should be "offset".

(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

(g) the Hawaii economy has been held in a state of arrested development.

21. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein."

In Count Two, then, the State of Hawaii asserts a claim as *parens patriae* in its ". . . capacity as a quasi-sovereign or as agent and protector of [its] people. . . ." *Georgia v. Pennsylvania R. Co., supra* at p. 443. The allegations made by the State of Hawaii in our present action parallel, to a large extent, those of the state in the *Georgia* case. The contention, essentially, is that the respondents as major producers, refiners and sellers of petroleum have combined and conspired to artificially inflate prices in this crucial industry which has resulted in a substantial injury to the economy and economic development of the State of Hawaii. Vast amounts of revenue have been extracted from the State by the respondents who are nationwide producers and sellers of petroleum products. These funds have been removed from the economy of the islands to the mainland. Hawaii has been discriminated against as a market. Moreover, the conspiracy is alleged to have diminished the revenues available to the State and otherwise frustrated and impeded the States's ability to promote the general progress and welfare of its citizens by a misallocation of the State's economic resources as a result of the price-fix here

alleged. In Count Two the State seeks damages pursuant to Section 4 of the Clayton Act (15 U.S.C. §15), in order to recover for the economic harm which the respondents have already caused by their alleged price-fixing conspiracy. Moreover, injunctive relief is sought to prevent the continuation of the economically deleterious price fixing conspiracy in the future. (R. 52-53) (App., p. 64.)

In a third count of the amended complaint, the State of Hawaii re-alleged the conspiracy and sought recovery pursuant to Rule 23 (Fed. R. Civ. Proc.) as representative of a class comprised of all purchasers (in the State) of respondents' gasoline, asphalt and/or other refined petroleum products (R. 51-53) (App., pp. 65-66.)

Respondents moved to dismiss Counts Two and Three. They argued that an action by the State as *parens patriae* would not lie to recover damages under the antitrust laws. (R. 56-57) (App., pp. 45-46, 68.) Moreover, as to Count Three, respondents challenged the class action as unmanageable. They argued that because the class involved (consumers of petroleum products) would be so large and diverse the Court should not allow the utilization of the class action remedy. (R. 38, 39) (App., p. 45-46, 68.)

The District Court agreed with respondents as to the impropriety of a class action and granted the motion to dismiss Count Three of the amended complaint. (R. 68) (App., pp. 80, 96.)

However, the District Court denied respondents' motion to dismiss Count Two of the complaint, recognizing that (R. 62) (App. p. 90.)

". . . if defendants' acts have a deleterious impact upon the general welfare or economy of the state, a state has standing to sue for both financial and injunctive relief in a *parens patriae* capacity."

The District Court's decision upholding Count Two was based on an historical and analytical application of the *parens patriae* doctrine. The Court recognized that the *parens patriae* remedy is available to the State where (a) a "substantial portion of the inhabitants are adversely affected" by the allegedly wrongful acts challenged in the action (R. 61) (App., p. 89); and (b) the deleterious impact upon the general welfare of the State and its economy are separate from the economic injuries suffered by individual citizens (R. 62, 64) (App., p. 88).

The District Court sustained the State of Hawaii's *parens patriae* claim because the respondents' alleged conspiracy was so widespread as to injuriously affect hundreds of thousands of citizens of Hawaii. Thus, a justiciable issue was raised concerning the adverse impact of the illegal price-fixing conspiracy on the State's economy. (R. 62) (App., p. 93.) The dismissal of the class action (Count Three) was based upon a recognition that the individual citizen-consumers of the products involved were so numerous and diverse, and would find it so difficult to verify their purchases that a class action would be unmanageable, and that these consumers therefore have no practical or effective individual remedy in their own right (which is the historical justification for the *parens patriae* remedy). While the losses suffered by each consumer-victim, on an individual basis, was relatively

small, the cumulative effect of the alleged conspiracy was to extract millions of dollars from the Hawaii economy.

In light of these considerations and additional factors such as the size and pervasiveness of the oil industry, the impact of its products and their prices upon the economic development of any geographic area, the nature of the price-fixing conspiracy alleged herein, and the effect of that conspiracy upon hundreds of thousands of small-volume consumers, the District Court found that the *parens patriae* remedy was proper *in the present case.*

The United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court. (App., pp. 106, 107.) The Court of Appeals expressed doubt that the general economy of a state could suffer injury as the result of an antitrust violation (even a violation such as a vast price-fixing conspiracy in a major industry as alleged in this case.) (App., p. 105.) The Court of Appeals went on to rule that even if measurable financial damage to the economy of the state could be defined:

> (1) Such a loss is not an injury to the business or property of the state or its people within the meaning of Section 4 of the Clayton Act; and
>
> (2) such an injury would be so indirect, remote and attentuated as to be outside the area of the economy ("target area") endangered by the conspiracy—hence, the state had no standing to obtain damages under the antitrust laws. (App., p. 105.)

The State of Hawaii petitioned this Court for a Writ of Certiorari in order to obtain review of the decision of

the Court of Appeals. The petition for Certiorari was granted on March 1, 1971. (App., p. 106).

SUMMARY OF ARGUMENT

Petitioner, the State of Hawaii, initiated this civil antitrust case for damages and injunctive relief, seeking to remedy injuries resulting from a comprehensive price-fixing conspiracy within the oil industry. It is alleged that the respondents—major producers and sellers of petroleum—have conspired to inflate the prices of petroleum products and to fix a discriminatorily high price structure in the captive market of the Hawaiian Islands. As a result of this conspiracy, the respondents have extracted many millions of dollars in illicit profits from the economy of the State of Hawaii and its citizen-consumers. (App., pp. 65, 70.)

At stake in the present case is the right of the State as *parens patriae* to recover damages for the injury arising out of this major and pervasive antitrust violation. It is clear that no other effective remedy exists in that the individual consumers who were overcharged as a result of the conspiracy ". . . would have only a tiny stake in a lawsuit and little interest in attempting a class action." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968). Moreover, at respondents' urging, the District Court below ruled that a class action on behalf of all consumers would be so unmanageable that it could not be allowed. (App. pp. 47-50, 74, 80.)

The present action by the State of Hawaii, as *parens patriae*, thus becomes the only meaningful and effective

alternative to permitting the respondents to retain *nearly all or a substantial portion* of the illicit profits which they derived from their illegal price-fixing conspiracy. The ruling of the Court of Appeals below, ordering the dismissal of petitioner's *parens patriae* claim therefore militates against the strong Congressional policy which favors the liberal availability of the civil damage remedy as a significant component in the vigilant enforcement of national economic and antitrust policy. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). As this Court recognized in the *Hanover Shoe* case, the consequence of the ruling of the Court of Appeals below would necessarily be that

> "*. . . those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality, because no one was available who would bring suit against them.* Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." 392 U.S. at 494. (Emphasis added.)

In view of this Court's decision in *Georgia v. Pennsylvania R. Co., supra,* the undesirable result of permitting respondents to retain their illicit profits need not and must not occur. *Georgia* recognized the standing of a state as *parens patriae* under the antitrust laws. Georgia's request for at least five million dollars was denied by the Court solely because the case involved the transportation industry, and any recovery of damages would have constituted a "rebate" prohibited by Congressional interstate commerce policy. (See *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156.) However, this Court went on to ob-

serve that suits by states as *parens patriae* ". . . should not be excluded from the purview of the antitrust acts." Moreover, the Court recognized that a state, as *parens patriae* has standing to pursue *all* available "civil remedies" and ". . . to enforce the civil sanctions of the antitrust laws. . . ." (324 U.S. at 447, 452).

Georgia and earlier cases upon which it relies establish beyond question that an injury to a state as *parens patriae* is a serious wrong against the state itself, independent of any injury to the citizens of the state. Pervasive and comprehensive antitrust conspiracies in major industries which impose discriminatory pricing patterns in a particular state ". . . affect the prosperity and welfare of a state. . . ." Such antitrust violations impede industrial development and contribute to the economic deterioration of the community. (324 U.S. at 450-451.) The State of Hawaii, here, must be allowed, by means of recovery of damages, to redress such injuries.

The *Georgia* ruling recognizes that such economic harm constitutes a legal wrong (324 U.S. at 451) which the state, as *parens patriae,* may remedy under the antitrust laws. As such the injury is one to legally protected *property* interests within the meaning of Section 4 of the Clayton Act (15 U.S.C. §15). See *Waldron v. British Petroleum Co.*; 231 F. Supp. 72, 86 (S.D.N.Y. 1964).

The decision of the Nnth Circuit Court of Appeals below is patently inconsistent with this Court's ruling in *Georgia.* The lower court erroneously stated that the economy of the State of Hawaii could not be injured by a major conspiracy as alleged herein. It went on to rule that even if such an injury could be shown, the loss could not be

measured in money damages. The lower court thus violated fundamental rules applicable to measurement of antitrust damages.

Under *Bigelow v. R.K.O. Radio Pictures, Inc., supra,* uncertainty concerning determination of damages must be resolved against the wrongdoers. But here, the Ninth Circuit summarily decided that—as a matter of law—petitioner (the innocent victim of the conspiracy) could not prove his damages without even affording it an opportunity to do so. The Court of Appeals' approach was clearly erroneous because, granting petitioners' standing, under *Georgia,* as *parens patriae,* there exist two alternative theories for the recovery of damages, either of which could be demonstrated before the jury by relevant economic data:

(1) The State of Hawaii could show, by statistical data and expert testimony that its economy and economic development was injured in a specific amount which is capable of being reasonably estimated. Yet, in open violation of this Court's dictates in *Bigelow,* the Court of Appeals reasoned that the mere possibility that uncertainty might exist as to measurement of damages must be resolved against the innocent victim of an antitrust violation. The wrongdoers thus retain the fruits and profits of their illegal acts because of the potentiality of uncertainty in measuring damages.

(2) Under an alternative theory of damages, the State in its capacity as *parens patriae* may recover as trustee, guardian and representative of its otherwise remediless citizen-consumers who were injured

by the price-fixing conspiracy. The damage in this respect is the illegal excess which Hawaii's consumers were overcharged over and above the fair and competitive price which would have been in effect but for the conspiracy. Damages would be ascertained simply as an amount equal to that overcharge, and such funds would be held and/or expended by the State as trustee for the benefit of the citizens.

In the final analysis, the decision and opinion of the Court below must be seen for what it is—a ruling antagonistic to the effective enforcement of national economic policy through the antitrust laws. Nowhere is this "anti-antitrust" attitude more clearly demonstrated than in that portion of the Ninth Circuit Court's opinion below concerning the "indirect" nature of the injury suffered by the State of Hawaii as *parens patriae*. Such concepts as "indirect" injury, "target area", "consequential" injury, "remote" injury and the like have been too frequently used by lower federal courts to restrict the availability of the treble-damage remedy to antitrust plaintiffs. It is as though these courts believe that the enforcement of the antitrust policy of the United States should be restricted rather than encouraged. These rulings have been made in the face of this Court's numerous and specific directions to the contrary. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *Radovich v. National Football League*, 352 U.S. 445 (1957).

In the instant case, this Court should reaffirm its ruling in *Georgia v. Pennsylvania R. Co.*, *supra*, establishing that an injury to the economy of a State is a

direct and *foreseeable* result of the type of anti-competitive conduct alleged against respondents herein; and, therefore, a civil action to remedy such an injury may be maintained by the State as *parens patriae* under the "antitrust acts" including Section 4 of the Clayton Act. See: *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967); *South Carolina Council of Milk Producers v. Newton*, 360 F.2d 414 (4th Cir. 1966); *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970).

The decision of the Court of Appeals below ordering the dismissal of petitioner's *parens patriae* claim must be reversed. The maintenance of the *parens patriae* claim is necessary to the continuing efficacy of the civil damage antitrust remedy. Any other result would permit the respondents to retain the enormous profits which they extracted from the economy and citizen-consumers of the State of Hawaii as a result of their flagrant and illegal price-fixing conspiracy, and would encourage other antitrust violators to initiate or continue similar pervasive price-fixing activity aimed at and directed against massive numbers of consumers.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS BELOW ERRONEOUSLY EMASCULATES THE EFFECTIVENESS OF THE CIVIL ACTION PURSUANT TO SECTION 4 OF THE CLAYTON ACT AS A VITAL MEANS FOR ENFORCING THE ANTITRUST POLICY OF THE UNITED STATES.

By its decision and opinion in the present case, the Court of Appeals for the Ninth Circuit has emasculated this Court's ruling in *Georgia v. Pennsylvania R. Co.*,

supra. But equally as significant, the Ninth Circuit's decision has further contributed to the erosion of the civil antitrust remedies provided by Congress as a significant component in the vigilant enforcement of national antitrust policy. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947). In its *Perma-Life Mufflers* ruling, this Court condemned judicially created restrictions which ". . . threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." 392 U.S. at p. 136.

The Court of Appeals invoked every imaginable theory and device to deny the State of Hawaii the right to maintain its civil antitrust action and thereby obtain financial redress for the antitrust violation here alleged which resulted in such substantial illicit profits for the respondents.

The lower court rejected the possibility that such a pervasive price-fixing conspiracy occurring in the socially and commercially crucial oil industry could result in a financial injury to the economy and economic well-being of the State. Such a finding implicitly rejects this Court's ruling in *Georgia v. Pennsylvania R. Co.* The Court also seemed to rule that even if such an injury could be recognized, no specific or precise measure of damages could be articulated. Thus, the plaintiff is apparently precluded and foreclosed even prior to trial and as a matter of law from developing and submitting the relevant economic data from which damages may be reason-

ably estimated. Such a position is totally inconsistent with such decision as *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251 (1946). The Court of Appeals went on to rule that even if the fact and amount of damages could be determined herein, the injury was remote, indirect and outside the area of the economy ("target area") endangered by the respondents' illegal conspiracy; moreover, it ruled that an injury *parens patriae* was not an injury to the "business" or "property" of the State of Hawaii within the meaning of Section 4 of the Clayton Act.

In this respect, the decision of the Court of Appeals in our present case not only reflects the judicially created chaos surrounding the question of standing under Section 4, it proceeds to compound that confusion and further obfuscate standing considerations by restrictively construing the words "business" and "property" in such a way as to limit the availability of this civil antitrust remedy and thereby weaken the effectiveness of the treble-damage action as a means for enforcing national antitrust policy. This Court, then, must forcefully reiterate the position which it has consistently followed of liberalizing the availability of the civil treble-damage remedy. Note, *Standing To Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 Colum. L. Rev. 570 (1964).

In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948), this Court stated, concerning Section 4:

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors or to

> sellers. Nor, does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150; *American Tobacco Co. v. United States*, 328 U.S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." [Citing *United States v. South-Eastern Underwriters Ass'n.*, 332 U.S. 533, 553 (1948).]

In *Radovich v. National Football League*, 352 U.S. 445, 453-454 (1957), the Court appeared to be specifically chastising those lower courts which had restrictively limited the standing of treble damage plaintiffs:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times-Picayune Publishing Co. v. United States*, 1953, 345 U.S. 594, 614, *and meet the requirement that petitioner has thereby suffered injury.* Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." (Emphasis added.)

See also: *Radiant Burners v. People's Gas & Light Co.*, 364 U.S. 656, 660 (1961).

In the light of this emphatic and express legislative and judicial policy favoring the availability of the civil remedy, it is almost incredible (especially in view of the *Georgia* case) that the respondents would stand before this Court and contend that although they have illegally

extracted several million dollars from the economy and citizens of the State of Hawaii, the State as *parens patriae* lacks standing to seek damages for redress of this pervasive antitrust violation. Any decision short of recognizing the right of the State as *parens patriae* to maintain this action for damages as well as injunctive relief would result in permitting respondents to retain *all* or at least *a substantial portion* of the illicit profits which they realized through their alleged price-fixing conspiracy.

II. THE STATE OF HAWAII SHOULD BE PERMITTED TO MAINTAIN THIS CIVIL ANTITRUST ACTION FOR DAMAGES AND INJUNCTIVE RELIEF IN ITS CAPACITY AS PARENS PATRIAE.

A. The Parens Patriae Remedy is Necessary in the Present Case.

Respondents, in their historical discussion of the *parens patriae* doctrine and the original jurisdiction cases in the Court below, mistakenly characterized the present action. The numerous cases cited by respondents, including *Oklahoma v. Cook*, 304 U.S. 387 (1937); *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Louisiana v. Texas*, 176 U.S. 1 (1900); *New Hampshire v. Louisiana; New York v. Louisiana*, 108 U.S. 76 (1883) and the more recent *Land O'Lakes Creameries v. Louisiana*, 160 F. Supp. 387 (E.D. La. 1958), all rule merely that a state may neither sue as *parens patriae* nor initiate an original action in the Supreme Court if the state is attempting to enforce the rights of a small and well-defined group of private citizens. The allegations of the complaint herein demonstrate that our case is completely distinguishable. The State of Hawaii does not here seek to

vindicate the private claims of its citizen-consumers. The individual injuries to these citizens were sought to be remedied through Count Three of the amended complaint in a class action in their behalf. However, the District Court dismissed the class action, at the urging of respondents that the class would be so large and diverse as to make adjudication of the individual claims of each consumer impossible. (R. 68) (App., p. 80.) A class comprising all of the consumers injured by the violation was consistently urged by respondents to be unmanageable (App. pp. 47-50, 74, 80) and the District Court agreed.

Thus, the hundreds of thousands of injured citizens who were consumers of respondents' refined petroleum products in Hawaii are unable to join in a class action. Individually their injuries are so small that realistically —and historically—it cannot be contemplated that their claims will ever be brought. Indeed, the statute of limitations has expired as to most of the period involved here without consumer actions having been initiated. Thus, if the decision of the Court of Appeals is allowed to stand, respondents will be permitted to retain the bulk of the revenue which they unlawfully extracted from the consuming public in the State of Hawaii.

Standard, Union, Shell and Chevron did (we must here assume) enter into a conspiracy to establish and impose artificially inflated prices for gasoline and other petroleum products in the Hawaii market and these respondents illegally derived substantial profits as a result of their monopolistic conduct. Is their wrong to go unremedied? Will these wrongdoers be permitted to profit from their illegality?

Our legal system must not and does not tolerate such unjust enrichment. A widespread anti-competitive discriminatory price-fixing conspiracy which, in its pervasiveness, victimizes millions of citizen-consumers in a particular state may cause a significant injury to the economy of the state itself. Such injury, if found to exist, may be remedied through an action brought by the state in its capacity as *parens patriae*. *Georgia v. Pennsylvania R. Co., supra.*

The necessary effect of decisions, such as that of the Court of Appeals below, would be to encourage manufacturers and sellers of mass-produced, widely distributed consumer products to engage in profitable antitrust violations. So long as the impact of the anti-competitive practice is sufficiently and pervasively distributed among millions of consumers, under the reasoning of the Court below, such monopolists will be able to retain their illegal profits. Government fines are but a miniscule fraction of the conspirators' illicit gains, and class actions are impractical because of the size of the prospective class and the relatively small financial loss of each class member.

Indeed, the decision of the Court of Appeals, if not reversed, would ironically encourage would-be antitrust violators to spread the anti-competitive effect of their illegal price-fixing over as large a portion of the consumer population as possible. The more comprehensive the illegal program, the better chance of avoiding any meaningful private treble-damage action.

This Court has recognized this dilemma in another context. In *Hanover Shoe, Inc. v. United Shoe Machinery*

Corp., 392 U.S. 481 (1968), this Court rejected the application of the "pass-on" defense, observing:

> "*These ultimate consumers,* in today's case the buyers of single pairs of shoes, *would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them.* Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." 392 U.S. at 494. (Emphasis added.)

Our case presents a situation more critical and urgent than that in *Hanover Shoe.* For here, as in *Hanover Shoe,* the hundreds of thousands of injured consumers have no practical antitrust remedy, but in addition, there exists in our case no "middlemen" who can effectively prevent the wrongdoers from retaining "the fruits of their illegality."

The reversal of the decision of the Court below and reaffirmation of the propriety of the *parens patriae* damage remedy as envisioned in the *Georgia* case provides the only effective means of dealing with such comprehensive antitrust violations.

The State of Hawaii has alleged that the subject matter of respondents' conspiracy concerns the prices charged for products in the Hawaiian market and that in Hawaii such prices are maintained at a discriminatorily high level as compared to prices for the same products in other United States' market areas. From the complaint

petitioner's contention is clear: that pursuant to this anti-competitive conspiracy, the respondents have predatorily preyed upon the numerous petroleum product consumers in Hawaii and have thereby caused substantial injury to the economy of the State.

This Court, then, must follow the dictates of its decision in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 445 (1945), where it was stated:

> "... we construe the allegation ... as a charge that defendants have conspired to fix rates so as to discriminate against Georgia."

In our case, as in the *Georgia* decision, respondents are alleged to be guilty of combining to fix prices in Hawaii. As such they have discriminated against Hawaii *as a state*. It is not necessary for the maintenance of this *parens patriae* claim to allege or prove that the respondents, in establishing discriminatorily high prices in Hawaii, acted with malice or ill-will against the State or its consumers. For, regardless of their intention, the impact of the alleged price-fixing conspiracy is equally injurious to the Hawaii economy. As the complaint alleges, in part: revenues have been unjustifiably extracted from the State's economy; opportunities in manufacturing, shipping and commerce have been restricted and curtailed; the high cost of manufacturing in Hawaii has precluded its products from equal competitive access to the national market as compared with those of other states; and the Hawaii economy has been held in a state of arrested development (R. 51).

Contrary to respondents' argument in the courts below, then, this case *does* involve a conspiracy to discriminate

against the State of Hawaii and its citizens. And, as a consequence of that conspiracy, the State of Hawaii suffered an injury to its economy. Under *Georgia v. Pennsylvania R. Co., supra,* the antitrust claim asserted by the State of Hawaii as *parens patriae* is properly alleged.

B. Georgia v. Pennsylvania R. Co. Established the Right of the State of Hawaii, as Parens Patriae, to Maintain an Antitrust Action as Alleged in Count Two of the Amended Complaint.

Respondents, in their briefs below, devoted extensive verbiage to an historical study of the *parens patriae* action and its utilization in permitting a sovereign to bring an action on behalf of legally incompetent citizens. Petitioner submits that this historical analysis, while interesting, is essentially irrelevant to the current action. It is clear under modern law that the state has the right to bring suit as *parens patriae* on behalf of all, or even a substantial portion of its citizens, whether or not they are legally competent. *Georgia v. Pennsylvania R. Co., supra; Land O'Lakes Creameries v. Louisiana,* 160 F.Supp. 387, 389 (E.D. La. 1958).

Other cases cited below by respondents concerned cases where the state improperly invoked the *parens patriae* doctrine in order to obtain original jurisdiction in the Supreme Court and circumvent the Eleventh Amendment in pressing what were essentially the private and individual claims of a relatively small and well-defined group of private citizens, *New Hampshire v. Louisiana; New York v. Louisiana,* 108 U.S. 76 (1883); *Louisiana v. Texas,* 176 U.S. 1 (1900); *North Dakota v. Minnesota,* 263 U.S. 365 (1923); *Oklahoma v. Cook,* 304 U.S. 387 (1937).

For example, in *Oklahoma v. A.T.&S.F. Ry.*, 220 U.S. 277 (1944) (also relied upon heavily by respondents below) the *parens patriae* issue was not even mentioned by this Court. That case involved primarily questions of the Court's original jurisdiction and the Eleventh Amendment neither of which are relevant here. Subsequently, the Supreme Court had occasion to characterize the *Oklahoma* case as "... a suit brought in the name of the state [but] in reality for the benefit of particular individuals" (324 U.S. at p. 446).

Of more relevance is another line of cases in which it was clear that the state, suing as *parens patriae* was pursuing its own interest or the *interest of a substantial portion of its citizens at large.* Thus, the propriety of the *parens patriae* suit was recognized and the state was accorded standing. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230; *South Dakota v. North Carolina*, 192 U.S. 286 (1904); *Georgia v. Pennsylvania Ry. Co., supra.* For clear guidance in determining the State of Hawaii's standing under Count Two in the present action, this Court must look to its most recent, most relevant, and most authoritative decision—*Georgia v. Pennsylvania R. Co., supra.*

The ruling of that case was that the state, as *parens patriae,* may maintain an action to remedy a violation of the antitrust laws, specifically with respect to violations of the Sherman Act. The Court recognized that a widespread, anti-competitive conspiracy in a major industry which results in imposition of an inflated and discriminatory pricing structure on the economy of a state constitutes a *serious public wrong.* The discriminatory pricing scheme alleged in the present case permits the respond-

ents to inflate their prices for all refined petroleum products (which in today's society are "necessities") at the expense of the economic well-being of Hawaii and its citizen-consumers. The Court in *Georgia v. Pennsylvania R. Co.*, recognized that when such discriminatory pricing policies are directed at the citizens and consumers of a particular state they

> ". . . may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a state as profoundly as the diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a state or put it at a decided disadvantage in competitive markets . . . . But discriminatory rates fastened on a region have . . . a more permanent and insidious quality. Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister states." 324 U.S. at 450-451.

Whatever implications the *Oklahoma* case and earlier decisions had regarding the *parens patriae* doctrine, such were completely superseded by *Georgia v. Pennsylvania R. Co., supra. Georgia* established, beyond question, that a state may maintain an action as *parens patriae* under the antitrust laws to remedy discriminatory rate or price-fixing conspiracies which are directed at that state's economy. Our present case is nearly identical to the situation in *Georgia*. As in *Georgia*, the case at bar *does*

allege a conspiracy, the impact of which, discriminates against the State of Hawaii and its citizens and injures the State's economy and prosperity. When a group of private conspirators combine to inflate prices for a necessary service or commodity and direct their discrimination against a substantial number of the consumers in a state, the state suffers an injury and it may—in its own name—seek an appropriate remedy. (324 U.S. at p. 447.)

Much of the argument in the courts below concerned the respondents' claim that a *parens patriae* action by the State could result in a double recovery against them. In support of this argument, respondents submitted a law review article which, it must be noted, was authored by two attorneys who are currently active in defending other *parens patriae* antitrust cases. Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws,* 65 N.W. L. Rev. 193 (1970).

This argument fails to recognize that the *parens patriae* claim here asserted by the State of Hawaii seeks recovery for injuries which *it* has sustained in its quasi-sovereign capacity. Compare: *Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra.* Moreover, respondents have ignored the fact that the *parens patriae* remedy by the State "... is classically exercised 'for the prevention of injury to those who cannot protect themselves' ". *Mormon Church v. United States,* 136 U.S. 1, 57 (1890). It has already been established here that the vast majority of citizen-consumers in Hawaii have no effective or feasible remedy on an individual basis to protect themselves from respondents' price fixing conspiracy. See Wade and Kamenshine, *Restitution for Defrauded Consumers,* 37 Geo.

Wash. L. Rev. 1031, 1048-1049 (1969); Note, *Antitrust Remedies*, 23 Vanderbilt L. Rev. 405, 411 (1970).

In nearly every successful *parens patriae* action which has been initiated in the past, it would be possible to identify individual injuries to particular private citizens. Thus, the mere fact that Hawaiian consumers of respondents' petroleum products were individually injured by the price fixing conspiracy does not preclude the State of Hawaii from maintaining an independent action to remedy the *separate injury* to its economy.

In *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), the states of Pennsylvania and Ohio were permitted, as *parens patriae*, to enjoin West Virginia's interference with the flow of natural gas to the plaintiff states and their citizens. The United States Supreme Court ruled:

> "The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. *This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected.* It is not merely a remote or ethical *interest* but one which is immediate and *recognized by law.*" (262 U.S. 592) (Emphasis added).

Many of the early *parens patriae* actions were allowed to remedy numerous varieties of nuisances which harmed private citizens in the plaintiff states, including cases involving the diversion of water, water pollution and air

pollution. *Kansas v. Colorado,* 206 U.S. 46 (1906); *Missouri v. Illinois,* 180 U.S. 208 (1901); *Georgia v. Tennessee Copper Co., supra.* In all of these cases, the Supreme Court recognized that the interests of the states were separate and apart from the related injury to their individual citizens. *Pennsylvania v. West Virginia, supra.* And in each case the utilization of the *parens patriae* remedy was permitted by the states because it was pursued to redress injuries which affected substantial portions of the citizenry. *South Dakota v. North Carolina, supra.*

Against the historical background of these cases in which the states were allowed to sue for injuries to themselves as well as to substantial portions of their inhabitants, the result reached in *Georgia v. Pennsylvania R. Co., supra,* logically and properly followed. In that case, it was alleged that certain railroad carriers had combined and conspired to fix freight rates at an unreasonably high and discriminatory level. It was further charged that this illegal situation caused injury to every shipper of goods within the State of Georgia. The State, as the plaintiff, alleged that it was economically injured in its proprietary capacity as the owner and operator of a railroad and as a large shipper of goods. However, the State of Georgia further contended that it possessed a cause of action "as *parens patriae* acting on behalf of [its] citizens" (324 U.S. at 450).

The Supreme Court agreed with the position advocated by Georgia, noting that the State had alleged that the illegal conspiracy injured its economy. The Court left no doubts as to the right of a State to initiate actions *parens patriae.*

> "But Georgia is not confined to suits designed to protect only her proprietary interest. The rights which Georgia asserts, *parens patriae,* are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, *has injured the economy of Georgia.* Those rights are of course based on federal laws . . .
>
> "And we find no indication that when Congress fashioned those civil remedies, it restricted the states to suits to protect their proprietary interests. Suits by a state, *parens patriae,* have long been recognized. *There is no apparent reason why those suits should be excluded from the purview of the antitrust acts*" (342 U.S. at 447) (Emphasis added).

This line of *parens patriae* cases, culminating in *Georgia v. Pennsylvania R. Co.,* clearly recognizes that when private wrongdoers pursue illegal activities directed against a substantial portion of the population of a particular State resulting in the systematic economic exploitation of those private individuals or their property, separate, albeit related, injuries are suffered by the individual citizens and the State itself.

In the instant case, the State of Hawaii has alleged that the respondents managed to dominate and control the market for refined petroleum products in Hawaii and used this combined power to overcharge Hawaiian consumers. Under the ruling of *Georgia v. Pennsylvania R. Co.,* this conduct was an actionable wrong harmful to the economic well-being of Hawaii itself, for which the State may seek remedies in this *parens patriae* action which are appropriate to compensate it for the injury suffered, and to enjoin further harm.

In this case, as in the *Georgia* case, the State of Hawaii has alleged direct pecuniary injury which it has suffered in its operation of public agencies and institutions. In this case, as in the *Georgia* case, the State has alleged statewide conspiratorial price discrimination in an essential industry, "a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development and relegates her to an inferior economic position among her sister states" (324 U.S. at 451).

The ruling of the District Court below correctly applied the *Georgia* case as binding and controlling precedent, and recognized that the State of Hawaii's amended complaint properly alleges its claim as *parens patriae*. The State is suing in its own right, not derivatively on behalf of private citizen-consumers; and the wrong perpetrated by respondents was a widespread one diffused over such a large and substantial portion of the inhabitants that no effective remedy exists on an individual basis.

The opinion of the Ninth Circuit Court below in reversing and ordering the dismissal of the *parens patriae* claim seems to fly in the face of this Court's decision in the *Georgia* case. The Court of Appeals expressed the opinion that the general economy is an abstraction which has no value in itself and, further, that it was doubtful that the general economy of a state could suffer an independent harm—even in a case such as ours involving a pervasive price-fixing conspiracy in a major industry which provides essential goods and services to individual and large commercial consumers. The decision of the Court

of Appeals below thus fails to follow the letter and spirit of the *Georgia* case by rejecting the basic premises of this Court's ruling: that a conspiracy as here alleged does cause a measureable injury to the economy and economic development of the State and its citizens; and such injuries and the accompanying requests for judicial relief raise justiciable issues under the antitrust laws. Accordingly, the judgment of the Court of Appeals, reversing the District Court and remanding the case for dismissal of the *parens patriae* claim, is clearly inconsistent with this Court's prior rulings.

III. PETITIONER STATE OF HAWAII, AS PARENS PATRIAE, MAY RECOVER DAMAGES UNDER SECTION 4 OF THE CLAYTON ACT.

Having established the propriety of this *parens patriae* action, under *Georgia v. Pennsylvania R. Co., supra,* as a remedy against a statewide, pervasive, price-fixing conspiracy which victimizes the citizen-consumers of the State of Hawaii, it cannot be denied that injunctive relief must be available to prevent the continuation of such an antitrust violation. *Georgia v. Tennessee Copper Co., supra; Pennsylvania v. West Virginia, supra.*

The Court of Appeals below ruled, however, that under no circumstances could the State of Hawaii recover damages. The Court neglected to explain what would become of the vast amounts of money that (accepting the allegations of the complaint as true) respondents have illegally extracted from the economy of Hawaii and the citizen-consumers of that State. But that consideration aside, the

law as construed, developed, and articulated by this Court in defining the nature of *parens patriae* actions and the policy of enforcement of the antitrust laws through civil treble-damage litigation, recognizes the propriety of recovery of money damages as sought by the State of Hawaii in this action.

A. Georgia v. Pennsylvania R. Co. Recognizes that All of the Civil Remedies and Sanctions of the Antitrust Laws Are Available to the State in An Action as Parens Patriae.

In *Georgia v. Pennsylvania R. Co., supra,* as in our case, the State sought relief from defendants who were engaged in a conspiracy in violation of the Sherman Act. In *Georgia,* as in our present case, the State sued in its proprietary capacity. In *Georgia,* as in our present case, the State sued as *parens patriae* invoking two separate but related theories in support of that status: *Georgia* sought to recover as *parens patriae* in its sovereign capacity for injury to its economy (First Count) and as *parens patriae* in its quasi-sovereign capacity as agent and protector of its citizens at large (Second Count). 324 U.S. at p. 443. Similarly Hawaii, as *parens patriae,* in its sovereign and quasi-sovereign capacities seeks to recover for injuries to its economy and economic development, and as trustee, guardian and representative of its citizens. (R. 50-51) (App., p. 64).

There has been much debate throughout the proceedings below as to whether, in *Georgia,* the State sought to recover damages. The answer is clear. Georgia sought to recover damages in the amount of $5,000,000 under each *parens patriae* Count. Similarly, in the present case the State of Hawaii seeks money damages arising out of

respondents' price fixing conspiracy which adversely affected the economy of the State and wrongfully extracted revenues from its consumers.

In *Georgia,* the Supreme Court ruled that an illegal conspiracy which operates to discriminatorily inflate prices for an essential service or commodity within a state is a wrong which harms the economy of that State. Thus, under *Georgia v. Pennsylvania Railroad,* such a wrong is "a matter of grave public interest in which the State, as the representative of the public, has a concern apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and *recognized by law*" (324 U.S. at 451) (emphasis added); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). And as the Court ruled in *Kansas v. Colorado,* 206 U.S. 46, 99, the State of Hawaii here

> ". . . is not acting directly and solely for the benefit of any individual citizen to protect his [private] rights. Beyond its property rights it has an interest as a state . . . . Its prosperity rises, therefore, above a mere question of local, private right and involves a matter of state interest, and must be considered from that standpoint."

In short, Hawaii's right as *parens patriae* to bring this action exists as "an interest independent of and behind the titles of its citizens." *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907); *Georgia v. Pennsylvania Railroad, supra.* The Court of Appeals and respondents must admit the propriety of suits *parens patriae* for equitable relief. However they totally ignore the historical parallelism as to the interests protected by Section 4 (treble-damage remedy) and Section 16 (injunc-

tive relief) of the Clayton Act. *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-133 (1969). It is anomalous to contend that an antitrust violation of the nature alleged herein causes legal injury sufficient to accord the State standing as *parens patriae* to seek an injunction under Section 16, but not sufficient to accord standing to obtain damages under Section 4 for the legal injury suffered. If there is an antitrust injury to a legally protected interest (i.e., "property") of the plaintiff, then that plaintiff may seek *all* available "remedies" and marshal all statutory "sanctions" under the federal "antitrust acts." 324 U.S. at p. 447.

This Court must reject the view expressed by the Court of Appeals (App., p. 104) that the scope of interests protected by the injunctive relief afforded under Section 16 of the Clayton Act (15 U.S.C. §26) is broader than the coverage of Section 4. Such an argument ignores the well-established and historically recognized identity of purpose which underlies both Sections 4 and 16. The two provisions merely create different remedies as alternative (and often cumulative) means of protecting the same interests and promoting the same policies. Thus, Section 16 permits a party in a civil action to obtain injunctive relief only if that party can demonstrate ". . . a threatened loss or damage . . ." to economic interests which the plaintiff has a legal right to protect. *United States v. Borden Co.*, 347 U.S. 514, 51 (1954). As this Court stated in the *Borden* case:

> "Under Section 16 of the Act, 15 U.S.C. §26, a private plaintiff may obtain injunctive relief against such violations only on a showing of "threatened

> loss or damage''; and this must be of a sort personal to the plaintiff, *Beegle v. Thomson,* 7 Cir. 1943, 138 F.2d 875, 881. *The private-injunction action, like the treble-damage action under §4 of the Act,* supplements Government enforcement of the antitrust laws . . . .'' 347 U.S. at p. 518 (Emphasis added.)

Accordingly, only if an antitrust plaintiff suffers an injury or is threatened with an injury to his economic or property interests is he allowed to seek relief through damages *or* injunction. It is, therefore, inconsistent to hold, as the Court of Appeals suggests, that the injury to the State of Hawaii was of sufficient economic or proprietary impact to confer standing on it as *parens patriae* to seek injunctive relief under Section 16, but not damages under Section 4. As this Court has most recently observed in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100 (1969) the only difference between the injunctive and treble-damage remedies is that the latter requires proof of past injury whereas the former requires proof of ''threatened'' injury. 395 U.S. at p. 130. Moreover, in making it clear that both civil remedies seek to vindicate the same private interests and public policies, the Court observed in *Zenith* that:

> ''We see no reason that the federal courts, in exercising the traditional equitable powers extended to them by §16, should not respond to the 'salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts.' *NLRB v. Express Publishing Co., supra,* 312 U.S. at 436. Although a district court may not enjoin all future illegal conduct of the defendant, or even all future

violations of the antitrust laws, however unrelated to the violation found by the court, e.g. *New York, N.H. & H.R. Co. v. ICC*, 200 U.S. 361, 401 (1906), '[w]hen the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.' *International Salt Co. v. United States*, 332 U.S. 392, 400, 68 S. Ct. 12, 17, 92 L.Ed. 20 (1947). *This is particularly true in treble-damage cases*, which are brought for private ends, but which also serve the public interest in that 'they effectively pry open to competition a market that has been closed by defendants' illegal restraints.' *Id.*, at 401." 395 U.S. at p. 133. (Emphasis added.)

The recognition of the identity of purpose and interests covered by the civil injunctive and damage antitrust remedies is significant regarding the applicability of the *Georgia* decision to petitioner's present prayer for damages. For if Hawaii, as *parens patriae*, can obtain injunctive relief to prevent the continuation of the injury it has suffered, then it is similarly entitled to seek damages for that injury. Any other interpretation would be illogical under Section 4, and render meaningless this Court's ruling in *Georgia v. Pennsylvania R. Co.*

On the other hand, if this Court's decision in *Georgia* is, as petitioner here contends, a controlling and well-reasoned interpretation of the law concerning the availability of the civil antitrust remedy, then it is clear that, as *parens patriae*, the State of Hawaii is entitled to avail itself of all the remedies of the federal antitrust laws, including the right to collect damages for the injuries which it has suffered:

> "But when it came to other *sanctions*, Congress followed a different course and authorized civil *suits* not only by the United States, but by other persons as well. And we find no indication that when Congress fashioned those civil *remedies*, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the antitrust *acts*" (324 U.S. at 447). (Emphasis added.)

In distinguishing *Oklahoma v. A.T.&S.F.R. Co., supra*, this Court went on to rule:

> "This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the *gravamen of which runs far beyond the claim of damage to individual shippers.*
>
> "Since the claim which Georgia asserts as *parens patriae* as well as proprietor *meets the standards of justiciability* and since *Georgia is a 'person' entitled to enforce the civil sanctions* of the antitrust *laws*, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action to this Court fail." (324 U.S. at 452.) (Emphasis added.)

Notice that in the above quotations from the most relevant and authoritative decision applicable to our present case, this Court recognized that a *parens patriae* action (such as petitioner's herein) may be used to pursue "civil *remedies*" under the federal "antitrust *acts*" and as such it is an appropriate vehicle "to enforce the civil *sanctions* of the antitrust *laws*." The use of the plural form in all of these words cannot be regarded as coinci-

dental, especially in light of the substantial request for damages of at least five million dollars which Georgia made as *parens patriae*. Rather they indicate that the full spectrum of civil antitrust remedies, including damages, is available in a *parens patriae* suit. There is nothing in the Court's language that would negate the propriety of damages in the present case.

In the *Georgia* case, the Supreme Court denied the State's request for damages, not because the suit was *parens patriae*, but solely because the suit involved the railroad and shipping industry in which Congress had expressly prohibited rebates. *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156 (324 U.S. at 453).

> "If a shipper could recover under Section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate operate to give him a preference over his trade competitors."

Thus, this Court was of the view that if the State of Georgia was permitted to recover any money damages whatsoever arising out of the illegal over-charge—irrespective of the capacity in which it was suing or the Count under which the recovery was obtained—such damages would effectively operate as a preferential rebate in violation of the Congressionally approved I.C.C. transportation policy. It is significant, in light of the substantial prayer for damages by Georgia as *parens patriae*, that this Court did not rule, nor did it even suggest, that money damages could not be recovered merely because of the *parens patriae* nature of the claim.

The Court of Appeals below, however, seized upon the superficial fact that no damages were awarded to Georgia and, rather than analyzing the reasons for denial of damages, erroneously concluded that damages may never be recovered by a state as *parens patriae* under Section 4 of the Clayton Act. The lower court's reliance on the "injunction-damages" dichotomy underscores the weakness of its analysis. For as stated above, if an injury is a legally cognizable one under the antitrust laws, both remedies should be available.

It must be remembered that a wrong committed against a state in its *parens patriae* capacity is an independent injury to an interest which ". . . is not merely a remote or ethical interest, but one which is immediate and recognized by law" *Georgia v. Pennsylvania R. Co., supra,* 324 U.S. at 451; *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). For such a legally recognized wrong, there must exist appropriate judicial remedies. To the extent that such a wrong causes economic loss—a damage remedy must be afforded. To argue that the past economic injury suffered by Hawaii should go uncompensated and that the State must be satisfied with restricting the future operation of the harmful activity defies logic, enlightened antitrust policy, and common sense.

Under our law, injunctive relief is an equitable remedy which is appropriate only in extraordinary cases. Damages, on the other hand, is a more commonplace remedy and hence more readily available. Yet the Court of Appeals below, in a classic example of quoting a sentence out of context, observed that *Georgia v. Pennsylvania R. Co.* involved an injunction to deter an illegal combination

then cited this Court's language in the case at 324 U.S. at p. 462: "No more is envisaged here."

That statement in the *Georgia* case was made with respect to the propriety of granting an injunction which would affect future shipping rates, the setting and approval of which are under the jurisdiction of the Interstate Commerce Commission. The words: "No more is envisaged here", do not imply, as the Court of Appeals suggests, that *parens patriae* damage actions are out of the question. Rather, when read in context, this sentence merely indicates that the granting of an injunction restraining defendants from illegally and coercively fixing rates would not interfere with the policies and subsequent official rate regulations of the I.C.C.:

> "No more is envisaged here. If the alleged combination is shown to exist, the decree which can be entered will be no idle or futile gesture. It will restore that degree of competition envisaged by Congress when it enacted the Interstate Commerce Act. It will eliminate from rate-making the collusive practices which the anti-trust laws condemn and which are not sanctioned by the Interstate Commerce Act. It will supply an effective remedy without which there can be only an endless effort to rectify the continuous injury inflicted by the unlawful combination." 324 U.S. at p. 462.

Unlike the *Georgia* case, our present action does not involve the transportation industry or any other industry whose rates and prices are set by federal law, so the reasoning in *Georgia* which precluded recovery of damages does not apply in the case now before this Court. It must therefore be recognized that the State of Hawaii,

petitioner herein, may utilize *all* available antitrust remedies—damages as well as injunctive relief to vindicate the injury to its interest as *parens patriae* ". . . which is immediate and recognized by law." The District Court, then, after a careful reading of the entire *Georgia* opinion properly concluded that the only rational inference to be drawn from that case is that an antitrust claim for damages as *parens patriae* was properly asserted by Georgia there and by Hawaii here. As the District Court below incisively stated:

> "Certainly the broad objectives of the antitrust statutes are not to be meanly or narrowly curtailed because it is a state that brings a damage claim thereunder in a *parens patriae* capacity." (R. 63-64.)

B. The State of Hawaii has Standing Under Section 4 of the Clayton Act to Maintain this Action for Damages, as Parens Patriae.

The Court of Appeals ruled that petitioner's suit as *parens patriae* was not cognizable under Section 4 because the State of Hawaii was not injured in its "business" or "property". Thus, the crucial issue which this Court must resolve is whether an injury to the economy of the State of Hawaii constitutes a well-defined and compensable economic loss. Petitioner submits that this Court has previously answered that question in the affirmative in *Georgia v. Pennsylvania R. Co., supra,* where it ruled:

> "But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae,* are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, *has injured the economy of Georgia.* Those rights are of course based on federal laws . . .

> "And we find no indication that, when Congress fashioned those civil remedies, it restricted the states to suits to protect their proprietary interests. Suits by a state, *parens patriae,* have long been recognized. *There is no apparent reason why those suits should be excluded from the purview of the antitrust acts.*" 324 U.S. at p. 447). (Emphasis added.)

In our case, the District Court properly followed the dictates of *Georgia* and recognized that suits *parens patriae* are included within the purview of *all* civil antitrust remedies. If the economy of a state can be injured by monopolistic activity, sound antitrust enforcement policy demands that civil actions initiated pursuant to Section 4 be available to remedy such injuries.

It seems clear that in its *Georgia* decision this Court has established that when an antitrust violation is serious enough to injure the economic development of the State, then the resulting damage is an injury to a legally protectable property interest of the State. Is that not the only logical inference to be drawn from the *Georgia* ruling which accords the State—as *parens patriae*—the standing to protect that very interest?

The Court of Appeals below failed to see the nature and extent of the injury to the State of Hawaii. Moreover, it failed to recognize that the word "property" in Section 4 of the Clayton Act includes all economic injuries to a plaintiff which the antitrust laws seek to prohibit. Compare: *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555 (1931); *South Carolina Council of Milk Producers v. Newton,* 360 F.2d 414 (4th Cir. 1966);

Mulvey v. Samuel Goldwyn Productions, supra; Waldron v. British Petroleum Co., 231 F. 72 (S.D.N.Y. 1964).

In defining the type of "property" interests protected under Section 4 of the Clayton Act, the Court in *Waldron, supra* stated:

> "The statute explicitly uses the words 'business or property' in the disjunctive. Congress intended this distinction to be meaningful. The word 'property' has wider scope and is more extensive than the word 'business'. *Less is required to prove 'property' than to prove 'business'.*
>
> "*The statute does not set up a qualitative or quantitative test to determine the existence of 'property'.* Nor does the statute contain a built-in definition.
>
> "The word 'property' is, in a sense, a conclusory term, i.e., *an interest which the law protects.* A determination whether plaintiff has 'property' involves *a value judgment as to whether that which plaintiff factually possesses should be legally protected.* If it be decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses 'property'." 231 F.Supp. at 86. (Emphasis added.)

This Court, in *Georgia v. Pennsylvania R. Co., supra,* has already made the "value judgment" that an injury to the economy and economic well-being of the state in its *parens patriae* capacity is the type of "property" protected by the antitrust laws. Therefore, the injury caused by respondents herein to that property interest of the State of Hawaii may be remedied by a damage action pursuant to Section 4. Inasmuch as petitioner has shown

that it is within the class of persons entitled to the protection of the antitrust laws, and that the injury caused is the type that the antitrust laws seek to prevent, both national policy and the law as articulated by this Court demand that petitioner be accorded the right to maintain and pursue this present action. See, for example, *South Carolina Council of Milk Producers v. Newton, supra*, 360 F.2d at pages 418-419, citing 64 Colum. L. Rev. 570, 585 (1964). See also: *Perkins v. Standard Oil of California*, 395 U.S. 642, 648 (1969); and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-701 (1962).

The law strongly favors the availability of private damage actions as an important component in the vigilant enforcement of national antitrust policy. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). What countervailing policy warrants the restriction of the damage action in the present case, merely because the petitioner's legally protected property interest is not tangible property which can be seen with the naked eye? It is clear that the respondents' conduct is of the type that the antitrust laws seeks to prohibit, and the interest of petitioner is "... within the zone of interests to be protected by . . ." such laws. See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

As this Court has stated on numerous occasions, in order to prevail under the Clayton Act, plaintiff need only prove a violation of the antitrust laws and resultant damage. *Radiant Burners v. People's Gas & Light Co.*, 364 U.S. 656, 660 (1961); *Radovich v. National Football*

League, 352 U.S. 445, 453-454 (1957); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 697 (1962); *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969).

In our present case, petitioner, the State of Hawaii, has alleged that respondents conspired to fix prices, which is a clear violation of Setcion 1 of the Sherman Act. Petitioner has also alleged that, as *parens patriae*, and by reason of respondents' antitrust violation, it has suffered substantial injury to interests which are protected by the "antitrust acts."

C. The Court of Appeals Erred in Ruling as a Matter of Law That the Economy of the State of Hawaii Could Not Be Injured by the Pervasive Conspiracy Here Alleged or That Any Such Injury Could Not Be Reasonably Measured in Damages.

The Court of Appeals, in open defiance of the *Georgia* ruling, questioned whether the economy of a state could in fact be injured by pervasive antitrust conspiracies such as those involved in *Georgia* and in our present case.

It would seem clear that *Georgia*, as buttressed by other *parens patriae* decisions of this Court, establish as a matter of law that a comprehensive and widespread price-fixing conspiracy in a major industry so crucial to the economic and commercial development of the State as is the oil industry causes an independent injury to the State itself which

> ". . . may affect the prosperity and welfare of a state. . . . They may stifle, impede, or cripple old industries and prevent the establishment of new ones . . . arrest the development of a state or put it

at a decided disadvantage in competitive markets." (324 U.S. at 450.)

The above-quoted words of this Court are not only consistent with sound social and legal policies under the antitrust laws, but also are in accord with sound economic theory. See, generally, Joe S. Bain, *Industrial Organization*, 1968; *Price Theory*, 1966; *Barriers to New Competition*, 1956; *The Economics of the Pacific Coast Petroleum Industry*, v. I-III, 1944-1947.

Modern technological and scientific advances have made it possible to determine the impact upon the economy of various anti-competitive and anti-social factors. See, for example, Isard, *et al.*, *On the Linkage of Socio-Economic and Ecological Systems*, 21 Papers of the Regional Science Ass'n., p. 79. (1968). As one commentator has observed:

> "The mathematical skills of economists and the availability of data about the economy have increased greatly in the last twenty years. Econometricians can now make rough mathematical descriptions of the key features of even so complex a system as the United States economy, and by means of input-output analysis, they can make crude estimates of damage to a regional economic unit. These calculations may be sufficiently precise for the measurement of damages in tort litigation. Moreover, in antitrust litigation the requirements of certainty of damages are applied more liberally in favor of the plaintiff than at common law. Further, it has long been recognized that exactness in measurement of damages is not necessary; it is sufficient that a reasonable basis for computation exists." *State Protection of Its Economy and Environment: Parens*

Patriae Suits for Damages, 6 Columbia Journal of Law and Social Problems, 411, 419-420 (1970).

Certainly, a pervasive price-fixing conspiracy such as is alleged herein, involves economic wastage and a misallocation of economic resources. Demetz, *Toward a Theory of Property Rights,* 57 American Econ. Review (1967); Neal, *et al., Report of the White House Task Force on Antitrust Policy, Antitrust Law & Economics Review,* Vol. 2, No. 2, Winter 1968-69, at p. 11. To the extent that the price-fixing conspiracy of the respondents operates here to "bleed" the economy of the State of Hawaii, it damages and detracts from various private proprietary interests held and limits the development of industrial opportunities—current and anticipated—within the State, and in turn, diminishes the tax base of that State. This is not only an injury to the business and property of the State, but also involves the kind of "economic inefficiency" [C. L. Allen, *The Framework of Price Theory,* p. 212 (1967] which the antitrust laws are designed to prevent. See also: Wade and Kamenshine, *Restitution for Defrauded Consumers,* 37 Geo. Wash. L. Rev. 1031, 1048 (1969). In this age of advanced economic development, a statewide price fix on a widely used consumer commodity has a tremendous impact not only on the direct purchaser, but on the economy of the state as a whole. Samuelson, *Economics, an Introductory Analysis,* 265-267 (1951); Note, *Antitrust Remedies,* 23 Vanderbilt L. Rev. 405, 409-411 (1970). Manufacturing, farming, shipping, any industry requiring transportation by motor vehicle, are inevitably affected by such a price conspiracy. Indeed, it has been correctly observed that

virtually *every sector of the economy* is affected by monopolistic misallocation of resources:

> "Not only consumers, but those who control the factors of production—labor, capital and entrepreneurial ability—benefit when resources are permitted to move into fields of greatest economic return; competition induces such movement and monopoly inhibits it." *Report of the White House Task Force on Antitrust Policy, supra,* at p. 21.

As the District Court so astutely observed in our case (R. 62):

> "The court would judicially notice that there is probably not a single industry nor more than an insignificant number of persons in Hawaii whose operations, life and livelihood are not connected in some way with, or affected by, the use of gasoline fuel and the other petroleum products referred to in the present complaint, and perforce therefore, the cost thereof."

One example of the type of harm which has been caused by price-fixing conspiracies such as that alleged against respondents herein is the artificially inflated price structure for necessary items. Such price-fixing and area price discrimination leads to an overall and disproportionate increase in cost of living for the residents and consumers in the geographical area (here, the State of Hawaii) which is victimized by the conspiracy. (See Comparative Living Costs Table, U.S. Dept. of Labor Bulletin No. 1570-1, p. 12, Autumn, 1966 reprinted opposite p. 39 of Petition for Writ of Certiorari previously filed herein.)

The most significant error made by the Court of Appeals below, however, was its finding that even if the

fact of injury to the economy could be established, petitioner was foreclosed—as a matter of law—from trying to establish the amount of its damage. In effect the court concluded that it would be impossible for the State of Hawaii to present evidence of relevant economic data which would provide a jury with a basis for reasonably estimating the dollar amount of the damages suffered.

This view is patently erroneous and inconsistent with numerous rulings of this Court which have expressly recognized that in antitrust cases,

> "... *the jury may make a just and reasonable estimate of the damage based on relevant data* and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as upon direct and positive proof' ... *Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.* It would be an inducement to make the wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery. The most elementary conceptions of justice and public policy require that the *wrongdoer shall bear the risk of the uncertainty which his own wrong has created.*" *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. at pp. 264, 265. (Emphasis added.)

See also: *Story Parchment Co. v. Paterson Parchment Paper Co., supra; Eastman Kodak Co. v. Southern Photo Materials*, 273 U.S. 359 (1927); and *Continental Ore Co. v. Union Carbide & Carbon Corp., supra.*

Rather than following the dictates of the *Bigelow* case, the Court of Appeals *summarily* and *arbitrarily* stated that the State of Hawaii could not reasonably present evidence of its economic injury even though the State has not yet been given the opportunity to attempt to marshal and present such evidence. Thus, rather than place the burden of "uncertainty" on the wrongdoers to bear the risk of imprecision as to the amount of injury caused by their antitrust violation, the Court of Appeals forced petitioner—the innocent victim of the antitrust conspiracy to bear the risk of potential uncertainty. Thus, because the economic damage to the State of Hawaii as *parens patriae could possibly* be difficult to measure, the State is denied the right to maintain the action.

Unfortunately, on the state of the present record—a decision on the pleadings alone—we can only speculate as to what type of relevant economic data would be presented at trial to provide the jury with a basis for making a reasonable estimate of the damages suffered by the State as *parens patriae*. It must be remembered that the civil damage action is such an essential and integral part of national antitrust enforcement policy that this Court has recognized that such a suit will not fail merely because the precise amount of damages is difficult to ascertain. Monopolists cannot be allowed to go free and enjoy the profits of their illegal conduct merely because their conspiracy was so effective and persuasive that damages are difficult to measure. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Bigelow v. R.K.O. Radio Pictures, Inc., supra; Zenith Radio Corp. v. Hazeltine Research, Inc., supra;* see also: *Washington*

State Bowling Prop. Ass'n. v. Pacific Lanes, Inc., 356 F.2d 371, 379 (9th Cir. 1966).

In fact, the Court of Appeals was completely erroneous in its belief that evidence is not available to formulate a reasonable estimate of the amount of damage suffered by the State of Hawaii as a result of the flagrant price-fixing agreement alleged here. One commentator, in addressing himself to our present case of alleged price-fixing in the oil industry, has articulated at least one specific way in which the antitrust violation here alleged has caused tangible economic injury to the State of Hawaii. The price increase caused by the respondents' price-fixing conspiracy could well be shown to have reduced the demand for and total consumption of motor gasoline thus directly affecting the tax revenues (assessed per gallon of gasoline sold) collected by the State of Hawaii. 6 Columbia Journal of Law and Soc. Problems at pp. 414-417.

Indeed, such information as the amount of overcharge per gallon of gas, which occurred by reason of the price-fix, multiplied by the number of gallons sold in the State of Hawaii during the time period here involved would be relevant economic data for the jury to consider. If anything damages so estimated would be an *understatement* of the actual general injury to the economy of Hawaii, but would insure, at least, a return of the illegally extracted funds.

In addition, the testimony of expert economists would provide enlightenment. In the final analysis, then, the standing of the State of Hawaii to maintain this present action under Section 4 of the Clayton Act is governed

by the cases discussed above and summarized by this Court's observation in *Continental Ore, supra:*

> "Where plaintiff proves a loss, and a violation by defendants of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that *the jury,* as the trier of the facts, *must be permitted to draw from this circumstantial evidence* the inference that the necessary causal relation exists." *Continental Ore Co. v. Union Carbide & Carbon Co., supra,* 370 U.S. at p. 697. (Emphasis added.)

D. The Court of Appeals Erroneously Ruled that the Injury to the State of Hawaii Was so Incidental, Remote and Indirect as to be Outside the "Target Area" of Respondents' Antitrust Violation.

The Court of Appeals below stated that, even if it accepted the notion of injury to the economy of a State as a result of an antitrust violation as alleged here, ". . . such injury is indirect and consequential. . . ." The Court of Appeals went on to state that "It has long been established that one whose injury is an incidental or remote consequence of defendant's violation may not recover under the Clayton Act", citing many of the so-called "target area" cases such as *Bookout v. Schine Chain Theatres, Inc.,* 253 F.2d 292 (2nd Cir. 1958); *Melrose Realty Co. v. Loew's, Inc.,* 234 F.2d 518 (3rd Cir. 1956); *cert. denied,* 352 U.S. 890 (1956); *Loeb v. Eastman Kodak Co.,* 183 Fed. 704 (3rd Cir. 1910); *Productive Inventions, Inc. v. Trico Products Corp.,* 224 F.2d 678 (2nd Cir. 1955). These decisions and others indicate that when an antitrust violation is "aimed at" a particular class of victims, the shareholders, lessors, creditors and others who are "outside that area of the econ-

omy endangered'' by the violation have no standing to maintain an action under Section 4 even though they suffered injury.

Initially, the Court below failed to recognize that this ''target area'' concept is a somewhat artificial limitation upon an antitrust plaintiff's standing to sue and one which runs counter to the national policy in favor of vigorous private enforcement procedures. See the numerous decisions and quotations of this Court set out in the Argument, above: *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., supra; Radovich v. National Football League, supra; Perma-Life Mufflers, Inc. v. International Parts Corp., supra; Lawlor v. National Screen Service, supra.* This Court has never approved of the ''target area'' limitation. 64 Colum. L. Rev. 570, 585 (1964).

The Court of Appeals decision below, and the cases it relied upon, reflects an ''anti-antitrust'' attitude which this Court has repeatedly and consistently condemned. The ''target area''—''indirect injury'' rulings as exemplified by the lower court's ruling herein, demonstrate an unwillingness on the part of some courts to enforce the clear policy and spirit of the federal antitrust laws as intended by Congress and consistently and uniformly construed by this Court. Instead of an important device for enforcing our national economic policy in favor of fair, free and robust competition, these courts regard the private treble-damage action as a ''windfall'', the availability of which should be restricted rather than encouraged. See: *Snow Crest Beverages v. Recipe Foods,* 147 F.Supp. 907 (D. Mass. 1956).

In *Radovich, supra* (352 U.S. at 453-454) this Court specifically disapproved of such formalistic and artificial limitations:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade', Times-Picayune Publishing Co. v. United States, 1953, 345 U.S. 594, 614, and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

The Court of Appeals below also failed to recognize or even address itself to the more recent and enlightened line of "target area" cases which have established that a plaintiff is within the endangered area of the economy, and thus has standing to sue under Section 4, if it could reasonably be foreseen that the plaintiff would be affected by the illegal conduct. *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970); *South Carolina Council of Milk Producers v. Newton, supra.* Ironically, it has been the Ninth Circuit itself which has led the way toward the more enlightened view of standing. In *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir. 1964) the Ninth Circuit Court ruled that:

> "But in using the words 'aimed at' this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather it was intended to express

the view that plaintiff must show that, whether or not then known to the conspirators, *plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy.*" (328 F.2d at 220). (Emphasis added).

See also: *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967) and *Mulvey v. Samuel Goldwyn Productions, supra.*

In *Georgia v. Pennsylvania R. Co., supra,* this Court made it clear that a widespread and pervasive private antitrust conspiracy aimed at businessmen or consumers within a particular State causes an independent injury to the State itself. In our case, the State of Hawaii and its citizen-consumers of petroleum products were the specific targets of the respondents' anti-competitive conspiratorial conduct. Because of Hawaii's relatively isolated geographical location, the State and its citizens became easy prey for the respondents. The complaint clearly alleges that the illegal price-fixing by respondents directly resulted in a discriminatorily inflated price structure being imposed for petroleum products within the State of Hawaii. Thus, under the *Georgia* case, respondents must be held to have been reasonably able to foresee that their illegal conduct would adversely affect the Hawaii economy.

Therefore, even if this Court accepts the "target area" limitation on standing, the injury to petitioner here was of the type that could reasonably have been foreseen by respondents to have resulted directly from their illegal conduct. Indeed, it must be seen that the State of Hawaii

and its marketplace *was* the geographic area of the economy which was the precise "target area" endangered ("aimed at") by respondents' price-fixing conspiracy.

This Court has recently had occasion, in a different context, to consider the standing of a party to sue under federal statutes. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). In *Data Processing*, this Court articulated two general standards for determining the propriety of a plaintiff's standing:

> "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." (397 U.S. at 152.)
>
> "[The second question is] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.... That interest, at times, may reflect 'esthetic, conservational, and recreational' as well as economic values. *Scenic Hudson Preservation Conference v. FCC*, 354 F. 2d 608, 616; *United Church of Christ v. FCC*, 359 F. 2d 994, 1000-1006. . . . We mention these non-economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioner relies here. Certainly he who is 'likely to be financially injured', *Commission v. Sanders Radio Station*, 309 U.S. at 417, may be a reliable private attorney general to litigate the issues of the public interest in the present case." (397 U.S. at 153-154.)

In stating the requirements for standing in *Data Processing* and *Barlow*, *supra*, the Court recognized that whether plaintiffs can in fact prove injury adequate to

support recovery relates to the *merits* of their claim, not to the preliminary question of standing. Such issues are pertinent only to the damage aspects of these cases, and have no relevance to standing to sue. And, when it comes to the issues of damages, this Court has been most specific in demanding that an antitrust plaintiff be given full opportunity to establish—*before the jury*—the nature and extent of the economic injury suffered as a result of the illegal anti-competitive conduct charged. *Bigelow v. R.K.O. Radio Pictures, Inc., supra.*

Thus, even if the "target area" and "indirect injury" considerations are accepted by this Court as limitations on the standing of civil antitrust plaintiffs, the State of Hawaii has clearly met and satisfied such requirements herein. Respondents' price-fixing conspiracy was aimed at the State of Hawaii, its market, its economy, and its consumer-citizens. It was reasonably foreseeable—under *Georgia v. Pennsylvania R. Co.*—that the economic well-being of the State of Hawaii and its citizenry would be adversely affected in a significant way by such a pervasive conspiracy in the important oil and petroleum industry. Therefore, the ruling of the Court of Appeals below dismissing petitioner's *parens patriae* claim because any injury so suffered was indirect and outside the "target area" of the alleged price-fixing conspiracy must be reversed.

IV. THE STATE OF HAWAII, IN ITS CAPACITY AS PARENS PATRIAE, SHOULD BE PERMITTED TO MAINTAIN THIS ACTION UNDER SECTION 4 OF THE CLAYTON ACT AS THE REPRESENTATIVE OF ITS CITIZENS.

Primarily, the position of the petitioner herein, consistent with the theory underlying *Georgia v. Pennsylvania R. Co., supra,* is that the respondents' pervasive conspiracy caused an injury to the economy of the State of Hawaii, which injury is separate and independent from the harm caused to the various individual consumers. Under *Georgia*, the injury to the economy must be viewed as an injury to a legally protected economic interest—"property"—which Congress intended to protect through Section 4.

In addition, the *Georgia* case recognized the standing of the State as *parens patriae* to represent and protect its citizenry—or a substantial portion thereof. Thus, there exists an additional and alternative basis for permitting the State of Hawaii to maintain the present action as *parens patriae*. In the words of the amended complaint: petitioner brought ". . . this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages . . ." (App., p. 64.) This rationale, when read in the light of the national policy favoring antitrust enforcement through the civil damage action clearly supports the propriety of the present suit and the standing of the State of Hawaii to recover damages as *parens patriae*. See, *Report of the Task Force on Productivity and Competition*, George J. Stigler *et al.*, Antitrust Law & Economics Review, Vol. 2, No. 3, Spring 1969.

Historically, it has been recognized that the State as *parens patriae* may bring civil actions as the *representative* of its citizens and to remedy wrongs committed against a substantial portion of them. In our case, the injury to hundreds of thousands of consumer-citizens is tantamount to an injury to the public at large. Accordingly, the State is the proper party to redress that injury.

This Court has historically recognized the propriety of the State suing private wrongdoers as the representative of its injured citizens. *Georgia v. Tennessee Copper Co., supra.* In *Missouri v. Illinois,* 180 U.S. 208, 241 (1901) the Supreme Court stated that ". . . if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." In *New York v. New Jersey,* 256 U.S. 298 (1921) the Court stated:

> "The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, *the State is the proper party to represent and defend such rights.* . . ." (at 301-302) (Emphasis added.)

Moreover, an adequate state interest is present to support a suit *parens patriae* whenever a substantial portion of the State's citizens have an interest in the controversy.

In *Kansas v. Colorado,* 185 U.S. 125, 142 (1901) the Supreme Court entertained an action *parens patriae* holding that a State had the right to invoke its original jurisdiction "as parens patriae, trustee, guardian or representative of all or a considerable portion of its citizens . . ." In *Land O'Lakes Creameries v. Louisiana,* 160 F.

Supp. 387 (E.D. La. 1958), a three-judge Court expressed the standard with regard to "a substantial number" of a State's citizens.

Significantly, the same theory was advanced by the State in its second count in *Georgia v. Pennsylvania R. Co., supra.* As noted previously, Georgia sought damages of at least $5,000,000.00 under these alternate theories of *parens patriae* recovery. In its opinion this Court observed that, as *parens patriae,* the State could utilize the remedies under the antitrust laws to redress injuries to its economy or to the well-being of its citizenry at large and seemed clearly to imply that the State could have recovered damages but for the Interstate Commerce Commission anti-rebate policy.

Moreover, it should be noted that in the landmark *parens patriae* case of *Georgia v. Tennessee Copper Co., supra,* this Court ultimately entered a decree which included a provision that the Tennessee Copper Co. ". . . undertook annually to supply a fund to compensate those injured by fumes from its works . . ." 237 U.S. 474, 476 (1915).

The argument made by respondents herein, and accepted by the Court of Appeals below, when taken to its logical conclusion, is that although they illegally conspired to inflate the prices for their products and although this pervasive artificial pricing structure occurring in the major and socially important oil industry injured the economy of the State of Hawaii and illegally extracted large sums of money from the citizen-consumers in that State, the wrongdoers are entitled to retain their illicit profits and defeat the efforts of the State as *parens*

patriae to obtain remedial compensation for either the injury which was inflicted upon the economy and well-being of the State, or the injury inflicted upon the hundreds of thousands of citizen-consumers who are without an otherwise effective and available remedy. The law has never been, and need never be, so blind and helpless in the face of such monumental illegality and wrongdoing. Compare: *In Re Permian Basin Area Rate Cases,* 390 U.S. 747, 825-828 (1968); *Wisconsin v. F.P.C.,* 373 U.S. 294 (1963); *California v. F.P.C.,* 296 F.2d 348 (D.C. Cir. 1961); *Guam v. Fed'l Maritime Comm.,* 329 F.2d 251 (D.C. Cir. 1964). Indeed, even taking the most narrow and limited view of the language of Section 4 of the Clayton Act, the numerous *parens patriae* cases cited above recognize that the State of Hawaii here has, as one of its most important aspects of "business", the task of protecting the safety, welfare and property of its citizens, providing essential services, and promoting the economic development and prosperity of the community at large. To the extent that the conspiracy here alleged against respondents detracted from the State's ability to perform this important business function, then, the State of Hawaii was injured and has standing to remedy that injury to its business under Section 4.

In light of *Georgia,* and under the historically recognized right of the State of Hawaii to protect the interests of hundreds of thousands of consumers of petroleum products, then, petitioner must be allowed to recover the amount of damages which respondents illegally extracted from the otherwise remediless citizen-consumers. In its *parens patriae* capacity, the State of Hawaii may be

awarded such damages as trustee and representative of the citizens. The damages recovered thus will be held and utilized for the benefit of the citizens at large.

Inasmuch as the injury to the citizen-consumers was to their "property" in the traditional sense of that term, the State as *parens patriae* is representing such citizens in that interest. Thus, it must be recognized that the State of Hawaii is seeking damages for specific monetary-property losses which it has a right to collect in its *parens patriae*-trustee capacity.

Moreover, under this theory of recovery, the respondents' contentions as to the alleged difficulties in the measurement of damages fails completely. The State, as *parens patriae,* could recover the total amount of the excess price—the illegal overcharge—which resulted from respondents' price-fixing conspiracy.

Therefore, where, as here, the hundreds of thousands of consumers injured by respondents' pervasive illegality cannot effectively protect themselves, the State must be permitted to represent them. The public purposes and policies which favor the liberal availability of the Section 4 damage remedy in promoting national antitrust enforcement cannot survive decisions such as that of the Ninth Circuit below. *Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra.* The State of Hawaii as *parens patriae* must be permitted to act as representative and trustee to recover damages on behalf of its injured and otherwise remediless citizen-consumers. Wade and Kamenshine, *Restitution for Defrauded Consumers,* 37 Geo. Wash. L. Rev. 1031 (1969). So construed, the *parens patriae* action would become the most effective and soci-

ally desirable means for remedying major antitrust violations such as the one alleged herein. *Wrongs Without Remedy,* 43 So. Cal. L. Rev. 570, 594-595 (1970). In the final analysis, such a decision would be good law, good policy and good sense.

CONCLUSION

For the foregoing reasons, the State of Hawaii respectfully requests that this Honorable Court reverse the ruling of the Court of Appeals below, and order that petitioner's claim as *parens patriae* be reinstated.

Dated: April 14, 1971.

Respectfully submitted,

BERTRAM KANBARA,
Attorney General, State of Hawaii,
GEORGE PAI,
Deputy Attorney General,
JOSEPH L. ALIOTO,
PETER J. DONNICI,
By PETER J. DONNICI,
Counsel for Petitioner.